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No. ___-_____

SUPREME COURT, U.S.
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SUPREME COURT OF THE UNITED STATES
October Term, 1986

WILLIAM LAUCHLAN,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

ON APPEAL FROM THE
JUDGMENT OF THE COURT OF APPEALS
OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether defendant was represented at trial by counsel who was reasonably effective and competent.

2. Whether the jury instructions given for the newly legislated crime of which defendant was convicted, sexual battery, were adequate to provide defendant with his constitutional rights to due process and a fair trial.

3. Whether the joinder of a misdemeanor and felony offense deprived defendant of his constitutional right to due process and a fair trial.

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are accurately set forth in the caption as defendant WILLIAM LAUCHLAN and the PEOPLE OF THE STATE OF CALIFORNIA.

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SUPREME COURT OF THE UNITED STATES
October Term, 1986

WILLIAM LAUCHLAN,	)
	)
Petitioner,	)
	)
vs.	)
	)
THE STATE OF CALIFORNIA,	)
	)
Respondent.	)
	)

ON APPEAL FROM OPINION OF THE COURT OF APPEALS OF CALIFORNIA AFFIRMING THE TRIAL COURT JUDGMENT

PETITION FOR WRIT OF CERTIORARI

Petitioner, WILLIAM LAUCHLAN, respectfully prays that a writ of certiorari issue to review the majority opinion of the California Court of Appeal which affirmed the Superior Court's holding that petitioner was guilty of a violation of California Penal Code Section 243.4, sexual battery, and the denial by the Court of Appeal of defendant's petition

for a writ of habeas corpus. The Supreme Court of California denied review.

OPINIONS BELOW

The opinion in the appeal of which review is sought in this Court was unpublished below. It was rendered by the Fourth Appellate District, Division Three, Case No. G002044. The petition for writ of habeas corpus was denied without opinion.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 USC section 1257(3) on the ground that his rights under the fifth, sixth and fourteenth amendments to the U. S. Constitution were violated.

The California Court of Appeal entered its order rejecting petitioner's claim on October 3, 1986. The Supreme Court of California denied the petition for review of the appellate court's opinion in the appeal. The Court of Appeal denied the petition for writ of habeas corpus on April 10, 1987. The

writ of habeas corpus on April 10, 1987. The instant Petition for Writ of Certiorari is filed within sixty days of the last denial.

CONSTITUTION PROVISIONS

The Fifth Amendment to the U. S. Constitution states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just

compensation."

The Sixth Amendment to the U. S. Constitution states:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

The Fourteenth Amendment to the U. S. Constitution states:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The questions on which review is sought were raised in the Court of Appeal below, both by appeal and by petition for writ of habeas corpus, and in the Supreme Court of California by petition for review, as shown below by citations to the record.

Regarding the third question raised herein, in the appeal Opinion below, on page two, the Court said first: "[T]he. . . question to concern us is whether Lauchlan was

prejudiced by the denial of his motion for severance." The second question raised herein was addressed on page four of the Opinion, where the Court said: "Next, Lauchlan seeks reversal of his conviction claiming the jury was inadequately instructed on the elements of sexual battery. . . ."

The first question raised herein, that of ineffective assistance of counsel, was raised by petition for writ of habeas corpus. The Court granted the writ in the first instance and sent the matter back to the Superior Court for a hearing. As a result of that hearing, the writ was denied, with the Court stating: "I. No conflict of interest existed between defendant and his counsel, Matthew Kurilich, during the trial", and "II. No showing was made that Kurilich was ineffective or incompetent as counsel for defendant."

Petitioner filed a second petition for writ of habeas corpus thereafter, claiming that he did not receive a fair hearing by the

Superior Court after the first petition was granted, in that the Court did not allow petitioner to put on the evidence needed to support his claim nor allow petitioner's counsel to cross-examine the main witness against petitioner except on very limited issues. That second petition was denied without opinion.

STATEMENT OF THE FACTS

The Opinion below did not include a statement of facts.

Defendant was convicted of one count of sexual battery, Penal Code §243.4, as the result of the following facts. On January 10, 1984 TAMMY FRANCINE FERGUSON was traveling northbound towards Santa Ana [RT 58:1-2] on the Newport Freeway [RT 57:13] at approximately 3:00 a.m. [RT 57:10-12] when she was pulled over by a Costa Mesa police car [RT 58:9-59:7], driven by defendant [RT 64:21-65:5], who was in full uniform. [RT 300:10-11]. Defendant exited his police vehicle, came up to Miss Ferguson's car, and told her

he pulled her over because of a dim left taillight. She got out of the car and looked for herself and saw that the taillight was slightly dim. [RT 59:12-26] Then defendant told her to follow him off the freeway because they had stopped in a dangerous spot. [RT 60:9-16] Miss Ferguson, in her car, followed defendant in his police car off the freeway. [RT 60:19-23]

Miss Ferguson testified that defendant thereafter got out of his vehicle and told her to get out of hers, that he grabbed her by her arms [RT 62], touched her all over, including putting his hands under her shirt and on her breasts [RT 63-64, 70:18], pressing his penis up against her body [RT 69:21-25], kissed her [RT 70:24-71:5], but did not ask her to perform any sex acts [RT 86:11-13]. She further testified that she left the area about 6:00 a.m. [RT 81:11-23] or between 5:30 a.m. and 6:00 a.m. [RT 83:4-12].

Facts elicited under cross-examination showed that Ferguson had first reported that

she and defendant drove their cars off the freeway to a gas station. She also had first reported being with defendant from 11:00 p.m. to 5:00 a.m., but trial testimony showed that she and her friends left a house in Orange about midnight in two cars and traveled to Newport Beach, where they left a house at 2:45 a.m. to 3:00 a.m. Testimony by an officer showed that Ferguson said she had been stopped by defendant at approximately 3:00 or 3:30 a.m., and a further witness said he saw her being pulled over by the police officer at 3:10 a.m. Defendant testified that Ferguson left him at approximately 3:30 a.m. There was testimony from another officer that defendant had made at least one radio communication between 3:00 a.m. and 5:30 a.m., contrary to Ferguson's testimony.

Defendant had been a police officer for approximately seven and half years and prior to that did police work in the military for about seven and a half years.

Ferguson subsequently filed a federal

court civil suit against defendant and his former employer. In a series of depositions taken in that case, Ferguson was shown to be a totally uncredible witness, changing her story of the events as many as four times. The depositions were presented to the trial court on the writ hearing, but said court would not allow petitioner's counsel to cross-examine Ferguson on the critical issues raised therein, so as to show the court her lack of credibility.

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REASONS FOR GRANTING WRIT

1. Defendant claims he was denied his right to effective representation at trial. Although a writ of habeas corpus was granted by the Court of Appeals and an evidentiary hearing held thereafter, defendant was prevented from putting on needed evidence at that hearing, with the result that the writ was discharged.

2. The appellate court did not specifically discuss or properly apply the guidelines of Williams v. Superior Court, 36 Cal. 3d 441, 447, 204 Cal. Rptr. 700, 683 P. 2d 699 (1984) for making a determination of whether joinder of charges is prejudicial to the defendant, although the court did mention the case.

3. The relatively new California statutory crime of sexual battery is a statutory combination of the law of false imprisonment and battery. Because there is some serious ambiguity and confusion in determining the precise elements required for

conviction under the new law, based on the requirements of the two crimes which it combined, there is a need for further examination of the jury instructions that are proper in the face of this charge, with defendant contending that in order to preserve his constitutional right to a fair trial, the jury should be instructed in the meaning of "unlawful restraint" as it is contained in the statute defining the crime of which he stands convicted.

4. When the two crimes of battery and false imprisonment are basically combined into one, known as a "sexual battery", with some requirements from each, there becomes a conflict when both the new crime of sexual battery AND one of the "older" crimes is charged, as here, where a false imprisonment was also charged. To be raised to the level of a felony, the crime of false imprisonment (Penal Code §236) requires that the requisite unlawful restraint be effected by means of "violence, menace, fraud, or deceit", not just

"violence or menace" as stated in the Opinion at page 5. Yet a battery, which by definition is any "willful and unlawful use of **force or violence** upon the person of another is only a misdemeanor unless it produces "serious bodily injury". Thus the failure of the jury to find the felony false imprisonment--i.e., no **force or violence** when it DID find the sexual battery--meaning the battery requirements of use of **force or violence** were met, is inconsistent and indicates the jury did not understand the elements required in each crime. Such an interpretation of a statute is unconstitutional in that it deprives a defendant of his right to be apprised of the requirements of the law, leading to a violation of his due process and equal protection rights.

It is recognized that there are many competing demands for this court's time. However, petitioner suggests this case warrants the Court's attention, in several respects: (1) there has, to date, been no

guidance by the California courts as to the proper interpretation of Penal Code §243.4. Such guidance at this point could prevent future appeals and result in a saving of court time; (2) petitioner was entitled to effective assistance of counsel at trial, which he was denied because of his trial counsel's failure to adequately investigate the witnesses against him and said counsel's actions in dating defendant's estranged wife before and during the trial of the matter; (3) California law has become confused in the area of when joinder of misdemeanor and felony offenses is or is not proper, with the joinder in this instance in violation of federal case law.

Many courts have set forth general statements of what is required in order to comply with the Sixth Amendment right to counsel (and some of those are set forth below), but few, if any, have actually tried to delineate precisely what was and was not required of counsel in order to meet the standard of "effective" counsel. Thus this

case could have a significant future effect on many parties or cases and help establish a uniformity in the quality of legal assistance to be provided to criminal defendants.

It has been decided by various courts that "the right to assistance by counsel includes the right to an adequate opportunity for consultation with counsel in the preparation of the defense prior to the trial, during the trial, and whenever else necessary, irrespective of whether the accused is at large or in jail." (emphasis added) 19 Cal. Jur. 3d (Rev), Criminal Law §2139, p. 600, citing, in fn 12, 13, 15, 16: Cornell v. Superior Court, 52 Cal. 2d 99, 338 P. 2d 447, 72 ALR 2d 1116 (1959); People v. Simpson, 31 Cal. App. 2d 267, 8 P. 2d 175 (1939); People v. Shields, 232 Cal. App. 2d 7161, 43 Cal. Rptr. 188 (1965); In re Caffey, 68 Cal. 2d 762, 69 Cal. Rptr. 93, 441 P. 2d 933 (1968); In re Ketchel, 68 Cal. 2d 397, 66 Cal. Rptr. 881, 438 P. 2d 625; People v. Zammora, 66 Cal. App. 2d 166, 152 P. 2d 180 (1944); Ligda v.

Superior Court, 5 Cal. App. 3d 811, 85 Cal. Rptr. 744 (1970).

"There must be more than the mere form or gesture of aid by counsel; the aid must be of a substantial nature. A defendant may not lawfully be convicted of an offense unless he is afforded the meaningful assistance of counsel in his defense." (emphasis added) 19 Cal. Jur. 3d (Rev), Criminal Law, §2167, p. 701. That standard is not met when counsel is ignorant of the invalidity of a charged enhancement (People v. McCary, 166 Cal. App. 3d 1, 212 Cal. Rptr. 114 (1985)), fails to interview numerous eyewitnesses (People v. Bess, 153 Cal. App. 3d 1053, 200 Cal. Rptr. 773 (1984)), refuses to participate in a trial (People v. Shelley, 156 Cal. App. 3d 521, 202 Cal. Rptr. 874, (1984)), fails to move for suppression of inadmissible evidence (People v. Rosales, 153 Cal. App. 3d 353, 200 Cal. Rptr. 310 (1984)), fails to inform defendant of a conflict of interest (People v. Jackson, 167 Cal. App. 3d 829, 213 Cal. Rptr. 521

(1985)), fails to assert a privilege for confidential marital communications where the prosecution's case hinged on the spouse's testimony (People v. Dorsey, 46 Cal. App. 3d 706, 120 Cal. Rptr. 508 (1975)), and fails to investigate and prepare an arguably potentially meritorious alibi and mistaken identity defenses (People v. Frierson, 25 Cal. 3d 142, 158 Cal. Rptr. 281, 599 P. 2d 587 (1979)). Several of the above areas as well as others were raised by petitioner as showing ineffective assistance of counsel and the review of this court is sought to better define and clarify the meaning of "effective assistance of counsel".

The argument below sets forth in more detail the evidence presented and the law involved in petitioner's appellant's contention that the Court of Appeal did not correctly decide the case.

ARGUMENT

I.

DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION BY COUNSEL AT TRIAL.

Although a hearing was held after the appellate court granted defendant's petition for writ of habeas corpus, defendant was prevented from putting on needed evidence at that hearing, with the result that the writ was discharged.

The court, in People v. Fosselman[1], a 1983 case, set forth the standard to be used in considering whether or not defendant received effective assistance of counsel and said that it was NOT necessary that a meritorious defense was lost due to counsel's actions. Rather, a claim of ineffective assistance of counsel can be "based on acts or omissions not amounting to withdrawal of a defense" and such a claim can be established

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1 33 Cal 3d 572, 189 Cal. Rptr. 855, 659 P. 2d 1144 (1983)

by showing that "his counsel failed to perform with reasonable competence and that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failings." That was an expansion of the previous standard set in 1979 by People v. Pope[2], on which the 1980 holding in People v. Lanphear[3] was based.

The standard for testing such a claim was exhaustively discussed by the U. S. Supreme Court in Strickland v. Washington, 466 U. S. 668, 683, 686, 686, (1984), which concluded that the standard for judging attorney performance is that of reasonably effective assistance considering all the circumstances, and further stated, at page 688, that "more specific guidelines are not appropriate". "From counsel's function as assistant to the defendant derives the

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2 23 Cal. 3d 412, 152 Cal. Rptr. 732, 590 P. 2d 859, 2 A.L.R.4th 1 (1979).

3 26 Cal. 3d 814, 163 Cal. Rptr. 601, 608 P. 2d 689 (1980), judgment vacated and cause remanded California v. Lanphear, 449 U. S. 810, reiterated 28 Cal. 3d 463, 171 Cal. Rptr. 505, 622 P. 2d 421 (1980).

overreaching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Continuing, the court said "that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." (emphasis added)

The standard is NOT, however, that a defendant must show that "counsel's deficient conduct more likely than not altered the outcome in the case", but only that there is "a reasonable probability" of a different result. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at p. 693, 694. "A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Id. at p. 696. charges against him.)

That Court then concluded that the defendant had not met his burden in that particular case, since the aggravating circumstances against him were "utterly overwhelming". Id. at p. 699. (In fact, the defendant had pled guilty to some of the charges against him.) The evidence against petitioner herein, however, was totally circumstantial, based almost solely on the testimony of one witness against him, therefore requiring a much more careful evaluation of the claim of ineffective assistance of counsel.

As the Court in Pope, 23 Cal. 3d at 426, recognized, however, an evidentiary hearing is often necessary to resolve the claims of ineffective assistance of counsel when reference to matters outside the record may be necessary. Here the Court offered petitioner's trial counsel the opportunity to respond in writing, rather than holding an evidentiary hearing.

Defendant further contends that he has a

right to have all of the errors he alleged and the cumulative effect of those errors considered at the same time and by the same court.

Although defendant's petition for a writ of habeas corpus resulted in the issuance of that writ and a hearing by the trial court, defendant was denied his constitutional rights of fully confronting the witnesses against him in that hearing, and prays this court to consider that issue along with his other allegations of error, so that full consideration can be given to ALL matters which may have influenced the jury's verdict of conviction.

Since the issue of ineffective assistance of counsel must properly be raised in state courts by a petition for a writ of habeas corpus, the effect of the errors alleged by defendant in his appeal and those alleged in the habeas corpus proceeding were not considered together, with the result that the <u>total</u> prejudice to defendant by the

cumulation of alleged errors was not before the court at one time so that all could be evaluated.

The court in People v. Pope, 232 Cal. 3d 412, 426, 152 Cal. Rptr. 732, 590 P. 2d 859 (1979) stated that a "claim of ineffective assistance [of counsel] is more appropriately made in a petition for habeas corpus" where the record "does not illuminate the basis for the challenged acts or omissions". Thereby, an evidentiary hearing can be held to have trial counsel explain his reasons for "acting or failing to act in the manner complained of". One of the major complaints of petitioner herein was the failure of his trial counsel to effectively examine and impeach the main witness against him, Tammy Ferguson, who has been subsequently seriously impeached in civil deposition testimony. Said witness was subpoened for the evidentiary hearing so that counsel could in fact show her demeanor and lack of credibility to the trial judge, but the court refused to allow petitioner's

counsel to cross-examine her on the material contained in her depositions, thereby totally depriving him of an opportunity to test her credibility and meet his burden of proof as to what his trial counsel should have done at trial.

The U. S. Supreme Court has addressed this problem of cumulative errors that cause prejudice in Glasser v. U. S., 315 U. S. 60, 62 S. Ct. 457, 463 (1942):

> "Admittedly the case against Glasser is not a strong one. [It] depends in large part . . .upon a development and collocation of circumsmtances tending to sustain the inferences necessary to support the verdict. This is significant in relation to Glasser's contention that he was deprived of the assistance of counsel contrary to the Sixth Amendment. In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some

circumstances would not be grounds for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

When any court reviews the alleged errors in two completely different sets of documents, filed under different case numbers, given the sheer volume of the cases before them, there is no possible way they can remember what has been presented in each set of documents such as to consider the cumulative effect of those alleged errors. Defendant therefore requests this court to independently review all evidence related to his claim of ineffective counsel along with the other legal errors set forth herein.

In Garton v. Swenson, 417 F. Supp. 697, 704, (D.C. Mo. 1976) defense counsel had failed to subpoena four alibi witnesses. The court held that once the petitioner has shown that his attorney's breach of duty has caused the absence of admissible evidence which would

have been helpful to his case, he must be granted a new trial unless a court can hold the belief that the omission of the evidence was harmless beyond a reasonable doubt.

Again, in United States v. Baraban, 599 F. Supp. 1171, 1182, (D.C. Fla. 1984) the court held that the relevant question in determining whether defendant is entitled to a new trial because of ineffective assistance of counsel is whether there is a reasonable probability that, absent errors, the fact finder would have a reasonable doubt about defendant's guilt. "Reasonable probability" was defined as "a probability sufficient to undermine confidence in the outcome".

While much of the material produced in the said depositions was not admissible in the prima facie case, there was a tremendous amount that could have been used for impeachment purposes. A jury almost certainly would have come away feeling that Ferguson, the primary witness against defendant, could simply not be believed. The fact that defense

counsel was an experienced criminal trial lawyer is also irrelevant, according to Garton, which said that the determining question is whether the assistance of counsel was effective under the facts and circumstances of the case. Given the amount of information about the complaining witness that was turned up AFTER the trial, and the fact that defense counsel was dating defendant's wife during the trial, his assistance could hardly be called that of a reasonably competent attorney.

II.

THE APPELLATE COURT WAS REQUIRED TO APPLY THE STANDARDS ENUCIATED IN WILLIAMS V. SUPERIOR COURT IN DETERMINING PREJUDICE TO DEFENDANT FROM FAILURE TO SEVER THE MISDEMEANOR COUNT FROM THE FELONY COUNTS.

Addressing the case of People v. McAlister, 54 Cal. App. 3d 918, 126 Cal. Rptr. 881 (1976) the appellate court, in its opinion, stated at page 2 that the only result

of that case would be to possibly require a reversal of a misdemeanor conviction had appellant been convicted of it.[5] The Court seems to imply that the holding in Aydelott v. Superior Court, 7 Cal. App. 3d 718, 86 Cal. Rptr. 713 (1970) is somehow contrary to McAlister, but such is not the case. Although Aydelott notes that Penal Code §954 does not distinguish between felonies and misdemeanors, it does not address the matter of the **jurisdiction** of the court AT ALL, and as was stated in McAlister at 927, "such joinder [under §954] presumes the existence of jurisdiction over each offense joined; jurisdiction is of course always fundamental and essential". (emphasis added) (Citing Witkin, Cal. Crim. Proc., §24 et seq.) However, since Lauchlan wasn't convicted of the misdemeanor offense with which he was charged, the court correctly stated that the only question is whether he was therefore

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[5] Defendant was charged with a **misdemeanor** sexual battery against one Ann Webber but was acquitted of that charge.

prejudiced by the denial of his motion for severance.

In People v. Balderas, 41 Cal. 3d 144, 171, 2 Cal. Rptr. 184, 711 P. 2d 480 (1985) the court states that it had provided "a detailed description" in Williams v. Superior Court, 36 Cal. 3d 441, 204 Cal. Rptr. 700, 683 P. 2d 699 (1984) of the factors "which should be considered in deciding a request for separate trials". Even though the underlying trial in Balderas had occurred before the opinion in the Williams case was issued, the court independently applied the Williams analysis to the Balderas claim of improper consolidation, giving us a practical application as a guide to the application of the Williams standards.

Determining that the "first step in assessing whether a combined trial was prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code Section 1101, in separate trials on the others." The facts

in Balderas showed that there were indeed certain similarities in the two December, 1979 incidents--"the proximity in time, the commandeering of vehicles, the use of a shotgun, and the partial or complete disrobing of the victims". That is far more than is present in the instant case where the court, in its Opinion at page 3, said the similarities were that "both victims were contacted by Lauchlan late at night while he was ostensibly on duty as a Costa Mesa police officer". Yet in Balderas, the court said "we are not certain they [the similarities listed] share marks so distinct in number and significance that they logically tend to isolate the same person as the perpetrator of both." The court in Williams at 450, had emphasized the importance of the "DEGREE of DISTINCTIVENESS of individual shared marks AND the NUMBER of minimally distinctive shared marks." In BOTH cases the court concluded that evidence of each incident would NOT be admissible in the separate trial of the other.

Those requirements are based on the holding in People v. Thornton 11 Cal. 3d 738, 114 Cal. Rptr. 467 (1974) in which the court, in addressing the issue of relevancy of other-crimes evidence on the issue of **identity**, said there must be (1) a **high degree of distinctiveness** in the common marks, (2) the **strength** of the inference as to identity must be evaluated based on the same two factors listed in Williams, and (3) if the inference of identity is weak, the evidence should be excluded. Objections based on these standards were sustained in People v. Antick, 15 Cal. 3d 79, 123 Cal. Rptr. 475 (1975) where items of property taken in a burglary of one victim's home showed up in defendant's possession, and the prosecution wanted to use that information in a case against the defendant for ANOTHER burglary.

In the case of People v. Poon, 125 Cal. App. 3d 55, 178 Cal. Rptr. 375 (1981), cited by the court in its Opinion at page 3, the similarities between the crimes were very

great: "(1) both involved sexual assaults upon juvenile Chinese girls, (2) initial contact was made with the victims by asking where a particular street was located, (3) both crimes occurred in the same area of the city, (4) both acts were perpetrated in unoccupied public buildings, (5) the perpetrator wore the same jacket on both occasions, and (6) the offenses occurred less than three months apart." Studying the very detailed analysis in Poon on the standards applied to determine cross-admissibility and prejudice from joinder, one could infer that if the facts of the instant case had faced the Poon court the results would have been to the contrary, with that court holding there was not enough similarity to allow cross-admission.

In United States v. Burkley, 591 F 2d 903, 192 U.S. App. D.C. 294, cert. den., 99 S. Ct. 1516, 440 U.S. 966,. 59 L.Ed.2d 782 the court discussed the same standards as those used above by the California courts, saying

that joinder of such offenses is allowable if evidence of each crime could be used in the trial of the other crime, AND there was no prejudice.

Thus petitioner contends that on the issue of cross-admissibility, the first step as to determination of the severance or joinder of the offenses, the court has not properly applied the standards set forth by case law.

However, as the cases go on to point out, even where there is no cross-admissibility, joinder sometimes is allowable, and further prejudice must be shown. One of the additional tests is whether a "'weak' case was joined with a 'strong' case or even another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all." Balderas at 173. Petitioner contends that such was the case herein, especially given the fact that as a policeman, he occupied a position of responsibility and

trust which, if breached, would cause the members of the public--and the jury--to feel that they had been personally "let down", as opposed to the defendant being merely a lay person like themselves. Thus they would very likely examine the charges against the defendant with a great deal more care than they would if he had not been a police officer. While none of the cases were terribly strong, a jury would probably feel that "where there's smoke there must be fire". With THREE charges against the police officer, there must be something to them or he wouldn't have been charged. That is something that was recognized as a fact in Gregory v. U.S., 369 F. 2d 185 (1966), where the court said that "the danger arising from the cumulative effect of evidence of other offenses on the minds of the jurors is too great to tolerate in such cases", where the trial offenses occurred at different times and places. The court in United States v. Foutz 540 F.2d 733, 736 (1976) said: "One inevitable consequence

of a joint trial is that the jury will be aware of evidence of one crime while considering the defendant's guilt or innocence of another. If the rationale of the 'other crimes' rule is correct, it would seem that some degree of prejudice is necessarily created by permitting the jury to hear evidence of both crimes." (emphasis added)

The appellate court did not apply the very specific guidelines set down in Williams, merely concluding that "the crimes not only contained a common element of substantial importance, they were similar enough in nature to be cross-admissible if tried separately to show Lauchlan's motive and intent." The fact that both alleged victims were "contacted" late at night and while he was on duty as police officer does not come anywhere near meeting the Williams standard, with the court not even discussing just what degree of distinctiveness the individual common marks shared NOR the number of those distinctive shared marks.

In discussing the difference between joining offenses where there is evidence of a common scheme and plan, under Rule 8 of the Federal Rules of Criminal Procedure, and joining them in other situations, the court in Foutz went on to say, at 737, that "when offenses are joined because they are of the same or similar character, however, admissibility at separate trials is not so clear." Where evidence showed two robberies of the same bank, the Foutz court held that was not enough for a joinder, and found an abuse of discretion in the trial court's failing to grant defendant's motion to sever. In Drew v. United States, 118 U.S. App. D.C.11, 331 F. 2d 85, 93 (1964), a robbery of two High's ice cream stores by blacks wearing sunglasses was insufficient for joinder. In United States v. Carter 154 U.S.App. D.C. 238, 475 F.2d 349 (1973), two robberies by a man wearing a fur coat and fur hat was likewise insufficient for joinder.

Based on correct application of those

standards, defendant contends that he was prejudiced by the joinder of the two weak cases, thus denying him due process of law and his right to a fair and impartial trial, such as to warrant a reversal of his conviction.

IV.

CONSIDERING THE ELEMENTS REQUIRED FOR CONVICTION OF FALSE IMPRISONMENT AND FELONY SEXUAL BATTERY, THE JURY VERDICT OF GUILTY OF SEXUAL BATTERY WAS INCONSISTENT WITH ITS FAILURE TO FIND GUILT ON FALSE IMPRISONMENT, CAUSING PETITIONER TO BE DENIED HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL.

To be raised to the level of a felony, the crime of false imprisonment (Penal Code §236) requires that the requisite unlawful restraint be effected by means of "violence, menace, fraud, or deceit", not just "violence or menace" as stated in the Opinion at page 5.

While the Court **assumed** that the jury found the "unlawful restraint" required in the sexual battery charge against defendant (Penal

Code §243.4) but NOT the "violence, menace, fraud or deceit" required to raise an unlawful restraint (i.e., false imprisonment) to the level of the felony with which defendant was also charged, it did not seriously consider the meaning intended by the legislature of "sexual battery" and the requirements set forth in §243.4 to find that crime. It should be noted that the legislature did not define the crime as "sexual **false imprisonment**", which might truly be said to be an unlawful restraint of a person with the requisite touching of an intimate part against the will of the person touched and for the purpose of sexual arousal, gratification or abuse, which crime, based on the punishments set forth for false imprisonment, would apparently be a misdemeanor. Once it were accomplished with "violence, menace, fraud or deceit" it would then appear to take on the character of a felony.

The legislature, however, called the crime a sexual **battery**, and, in fact, the

court has held, in In re Keith, 156 Cal. App. 3d 983, 988, 203 Cal. Rptr. 112 (1984) that the offense of simple battery (Penal Code §242† is a **necessarily included offense** in the offense of sexual battery, Penal Code §243.4. The definition of a battery, as found in Penal Code §242, is "any willful and unlawful use of **force or violence** upon the person of another". Yet a battery, unless it produces "serious bodily injury", is a misdemeanor, not a felony.

Thus there would appear to be a conflict between the use of "force or violence" requirements as they appear in the crime of battery and the crime of false imprisonment, with their being used in the former case as a REQUIREMENT for the finding of the misdemeanor, and in the latter case as the REQUIREMENT for turning the crime into a felony. This is not a conflict of any note, however, since they are different crimes, UNTIL the two crimes are combined into a NEW crime based on both of them and with the

addition of some sexual requirements and called a "sexual battery". Now the "violence" requirement of a felony unlawful restraint is combined with the misdemeanor battery in which violence is a requirement, for a totally hybrid crime that is not adequately and thoroughly defined, and deprives a defendant of his constitutional right to know and understand the requirements of the law and the charges against him.

It is thus no wonder that the jury was unable to understand the elements for which they were looking in the two crimes charged and ended up, as defendant contends, in an inconsistent verdict. Rather than looking at the simplistic requirement of "violence", etc., which turns a misdemeanor false imprisonment, i.e., an unlawful restraint, into a felony, and deciding the jury obviously didn't find it, a better approach would be to have looked more thoroughly into the underlying concept of the new crime, sexual battery, and attempted to reconcile the

various definitions of the words actually used in that section. Petitioner contends that such reconciliation is not possible with the verdicts rendered by the jury and thus his conviction should be overturned for violation of his constitutional rights, with instructions as to the meaning of the words used in the statute.

One can look further to "menace", one of the alternative requirements turning a false imprisonment into a felony, but that is not substantially helpful here. Menace in CALJIC 9.60 is defined as meaning "a threat of harm express or implied by word or act". In Black's Law Dictionary (4th Ed.), menace is described as "a threat; the declaration or show of a disposition or determination to inflict an evil or injury upon another". Webster's New Collegiate Dictionary (1981) defines the word as "a show of intention to inflict harm: threat". According to People v. Stoddard, 227 Cal. App. 2d 40, 41, 38 Cal. Rptr. 407 (1964), menace is "a show of

intention to inflict harm: a threatening gesture, statement, or act against".

Duress and menace are often interchangeable. Leeper v. Beltrami, 53 Cal. 2d 195, 203, 1 Cal. Rptr. 12, 347 P. 2d 12 (1959). Duress has been defined as the "compulsion or constraint by which a person is illegally forced to do or forbear some act by actual imprisonment or physical violence to the person or by threat of such violence, the violence or threat being such as to inspire a person of ordinary firmness with fear of serious injury to the person or loss of liberty or of life or limb, reputation, or fortune." Webster's Third New International Dictionary, 1961 Edition, p. 703.

According to the Attorney General, Opinions, Vol. 64, Nov. 1981, "duress" and "menace" in their common and ordinary meanings, encompass the "fear" element in Penal Code §286(d), the statute listing the punishment for another sexual crime, that of

sodomy.[6] Yet, "in the absence of force, use of fear to detain a person" cannot even establish a seizure or confinement sufficient to prove a misdemeanor false imprisonment if the person is at no time "compelled to obey". People v. Martinez, 150 Cal. App. 3d 579, 198 Cal. Rptr. 565 (1984).

Thus it would appear that the multitude of authorities interpreting the same words in different but similar statutes enacted over the years has resulted in some confusion and ambiguity in understanding the legislature's real intent. Petitioner should not be the one to bear the hardship imposed on a criminal defendant because of such results. Rather, this court should accept the challenge of attempting to bring into line with federal constitutional law all of the related statutes and authorities so that future criminal

---

[6] Penal Code §286(d) provides in applicable part that "any person who, while voluntarily acting in concert with another person. . . .commits an act of sodomy when the act is accomplished against the victim's will by means of force or fear of immediate and unlawful bodily injury on the victim or another person . . . . will be punished by imprisonment in the state prison for five, seven or nine years." (emphasis added)

defendants may clearly know and understand the nature of the charges against them and the requirements against which they must defend.

Having discussed ONLY the element of "violence or menace"--and that very briefly, the Court below failed to fully consider the points made hereinabove.

V.

IN CONSIDERING THE JURY INSTRUCTIONS NECESSARY IN A RELATIVELY NEWLY DEFINED CRIME TO PRESERVE THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, THERE NEEDS TO BE DEFINED A DUTY TO INSTRUCT ON THE MEANING OF "UNLAWFUL RESTRAINT".

As set forth in the discussion under IV above, there is some serious ambiguity and confusion in determining the precise requirements for a felony conviction under §243.4, considering the requirements for both a misdemeanor and felony battery--§§242 and 243--and those for both a misdemeanor and felony false imprisonment--§§236 and 237.

The court below was quite correct that no authority was cited for there being a sua sponte duty to instruct on the precise meaning of "unlawful restraint" as found in §243.4, there presently being no such authority. One might note that until the case of People v. Hamilton, 80 Cal. App 3d 124, 145 Cal. Rptr. 429 (1978), there was also NO sua sponte duty to instruct on the offense of felony hit-and-run driving that "an essential element of the crime was defendant's knowledge that he was involved in the accident". However, after the Hamilton decision, CALJIC 12.70 was amended to include that requirement.

In the instant case we are looking at a relatively newly-defined offense, which takes elements from the offenses of battery and false imprisonment and adds requirements of certain sexual actions to define a "new" offense, that of sexual battery. It is surely the precise scope and duty of the lower courts to provide just such interpretations of new laws for the guidance of the practitioners in

the trial courts.

Even though defendant's trial counsel went with the approved CALJIC instructions for the various offenses charged, defendant should not be penalized for something which could not be foreseen--that is, that the jury would evidently become confused over the requirements for the false imprisonment as they related to the requirements for the sexual battery and bring in what defendant believes are shown to be inconsistent verdicts.

A court must "look at the jury instructions as a whole in assessing whether they constituted prejudicial error." United States v. Lemire, 720 F. 2d 1327, 1340 (1983). In Lemire the instructions failed to define "a legally significant term like 'material non-disclosure'", and the court said that if it had believed "there was a substantial possibility that the jury convicted on an improper legal theory" it would be inclined toward a liberal construction of the

defendant's dissatisfaction with the instructions as they were given. While the court in Lemire did not find the required prejudice, petitioner contends that in his case the prejudice is evident by the confusion of the verdicts.

CONCLUSION

Petitioner respectfully requests the court to grant his petition for a writ of certiorari.

Respectfully submitted,

PAOLI & PAOLI, INC.

By_____
SYLVIA L. PAOLI
Attorneyfor Petitioner

APPENDIX

Exhibit "A"--Order Denying Petition for Review by California Supreme Court

Exhibit "B"--Order Denying Petition for Writ of Habeas Corpus

Exhibit "C"--Opinion of the Fourth District Court of Appeals, Division Three

Exhibit "D"--Order Denying Writ and Findings Thereon (After Hearing)

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4TH DISTRICT, DIVISION 3, NO. G002044

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

==========

PEOPLE

v.

WILLIAM LAUCHLAN

==========

Appellant's petition for review DENIED.

Filed February 18, 1987
Laurence P. Gill, Clerk
Deputy

BROUSSARD
Acting Chief Justice

Exhibit "A"

BEST AVAIL

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re WILLIAM LAUCHLAN	)
	) O R D E R
on	)
	) G004795
Habeas Corpus	)
	) (Super. Ct.
	) No. C-53560)

THE COURT:*

The petition for a writ of habeas corpus is DENIED.

TROTTER

TROTTER, Presiding Justice

* Before Trotter, P.J., Wallin, J. and Crosby, J.

Exhibit "B"

ABLE COPY

THE ENCLOSED INFORMATION REGARDING CASE NUMBER

G004795 HAS BEEN SENT TO THE FOLLOWING:

Paoli & Paoli, Inc.
Paoli, Sylvia L.
17731 Irvine Blvd.
Suite 219
Tustin, CA 92680

Atrtn: James F. Judge
Superior Court, Criminal Division
700 Civic Center Dr. West
Santa Ana, CA 92701

Office of the Attorney General
Van De Kamp, John K.
110 West "A" Street
Suite 700
San Diego, CA 92101

Office of the District Attorney
Hicks, Cecil
700 civic Center Dr. West
Santa Ana, CA 92701

Office of the County Clerk
Orange County
700 Civic Center Dr. West
Santa Ana, CA 92701

If applicable:
Appellate Defender, Inc., San Diego

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent v. WILLIAM LAUCHLAN, Defendant and Appellant.	G004795 (Super. Ct. No. C-53560) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James F. Judge, Judge. Affirmed.

Paoli & Paoli and Sylvia L. Paoli for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Michael D. Wellington and Pat Zaharopoulos, Deputy Attorneys General, for Plaintiff and Respondent.

Exhibit "C"

Costa Mesa Police Officer William Lauchlan was charged in an amended information with three felony and three misdemeanor counts involving three separate incidents and victims. Three of the charges were dismissed before trial, and Lauchlan proceeded to trial on two felony counts (sexual battery and false imprisonment) involving one victim and a misdemeanor assault charge involving a second. He was acquitted of the latter and only convicted of sexual battery, which the court reduced to a misdemeanor. He raises numerous issues on apeal. We affirm.

I

Relying on People v. McAlister (1976) 54 Cal. App. 3d 918, 927, Lauchlan first challenges the court's denial of his motion to sever the two felony charges involving victim Tammy F. from the misdemeanor count involving victim Ann W. But McAlister is inapt in this context. The effect of that opinion, if its holding is correct (compare, e.g., Aydelott v. Superior Court (1970) 7 Cal. App. 3d 718,

722), would be to require reversal of a conviction of the misdemeanor count. Lauchlan, of course, was acquitted of that charge. Consequently, the only question to concern us is whether Lauchlan was prejudiced by the denial of his motion for severance. (Williams v. Superior Court (1984) 36 Cal. 3d 441, 447.)

The defendant's burden on appeal to demonstrate prejudicial abuse of discretion is onerous, however: The appellate court evaluates the question "in light of the showings . . . and the facts [] known [to the trial court]." (People v. Balderas (1985) 41 Cal. 3d 144, 171.) And separate offenses are considered to be "connected together [and thus eligible for joinder] . . . where there exists 'a common element of substantial importance in their commission,' even though the offenses charged do not relate to the same transaction and were committed at different times and places against different victims. [Citations.]" (People v. Poon (1981) 125 Cal.

App. 3d 55, 68.) Here, both victims were contacted by Lauchlan late at night while he was ostensibly on duty as a Costa Mesa police officer. Thus, the crimes not only contained a common element of substantial importance, they were similar enough in nature to be cross-admissible if tried separately to show Lauchlan's motive and intent. Sexual gratification, although not necessarily rape, was a common motive in both incidents. We find no abuse of discretion in the denial of the motion to sever. (People v. Balderas, supra, at p. 177.)

II

Lauchlan next provides a laundry list of approximately forty-five questions which he concludes, when considered with several comments by the deputy district attorney in opening statement, demonstrate prosecutorial misconduct. Lauchlan cites no authority for his argument and makes no attempt to explain in what manner he was allegedly prejudiced. Nevertheless, we have reviewed the opening

statement and the record in order to consider the questions and defense counsel's objections in context. We find no basis for Lauchlan's complaints and no misconduct by the prosecutor.

Lauchlan also lists six rulings by the trial court, four of them dealing with evidentiary matters, which he concludes were improper and violate his right to due process. Again, he has failed to cite any authority or demonstrate a factual basis for his claim of prejudice. We have reviewed the issues in detail and find no error.

III

Next, Lauchlan seeks reversal of his conviction claiming the jury was inadequately instructed on the elements of sexual battery, specifically the court's failure to define "unlawful restraint." But in explaining the elements of that offense, the court read verbatim the special instruction requested by the defense. It provided, ". . . Every person who touches an intimate part of another person

while that person is unlawfully restrained by the accused . . . and if the touching is against the will of the person touched and is for the purpose of sexual arousal, gratification or abuse, is guilty of a sexual battery. . . ." (Emphasis added.)

Lauchlan does not contend (and we have found no authority for the notion in any event) the court was required sua sponte to define the term. Under these circumstances, any error in the failure to explain the meaning of "unlawful restraint" was surely invited and cannot provide a basis for reversal of the conviction.

IV

Finally, Lauchlan argues the verdict of guilt of sexual battery against Tammy F., necessarily based on a finding of unlawful restraint, was inconsistent with the jury's inability to reach a verdict on the false imprisonment charge involving the same victim. Not true.

A conviction of sexual battery requires

the touching of an intimate part of the victim's body against his or her will, for the purpose of sexual arousal, and while the victim is unlawfully restrained. The elements of felony false imprisonment, with which Lauchlan was charged, also include "an intentional and unlawful restraint, confinement or detention. . . ." (CALJIC No. 9.60.) But that restraint must be accomplished "by violence or menace." (Ibid.) Thus, a unanimous finding by the jurors that the victim had been unlawfully restrained, without more, is insufficient to convict of false imprisonment; the jurors must also agree the restraint was accomplished by the actual exercise or threat of physical force. Violence and menace, however, are not elements of the offense of sexual battery. The conviction was not inconsistent with the jury's failure to agree on the false imprisonment charge.

Judgment affirmed.

Crosby, J.

WE CONCUR:

Trotter, P. J.

Wallin, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. IN RE WILLIAM LAUCHLAN, Defendant.	CASE NO. C-53560 (APPEAL NO. G002044) ORDER DENYING WRIT AND FINDINGS THEREON

Pursuant to the order of the Court of Appeal, this Court conducted a hearing on the petition for writ of habeas corpus on May 6, 1986. After completion of testimony and argument, the matter was taken under submission. The court now rules as follows:

I. No conflict of interest existed between defendant and his counsel, Matthew

Exhibit "D"

Kurilich, during the trial. In this connection, the Court finds facts as follows:

Defendant separated from his wife on March 22, 1984 and moved out of the house on the same day. The jury trial took place from June 15, 1984 to July 11, 1984, and sentencing took place on September 13, 1984. Defendant's wife was present every day during the trial and at the sentencing, however they remained separated. On one occasion, his wife told defendant that she, a registered nurse, had learned that Kurilich was ill, that she had advised him to rest in bed and take aspirin, and that she had gone to his apartment in Newport Beach to minister to Kurilich.

Between March 8, 1984 and August 8, 1984, a period of 153 days, defendant's wife made about 150 phone calls to Kurilich (Exhibits 1 & 2). Between March 21, 1984 and September 13, 1984, a period of 175 days, Kurilich made about 200 phone calls to defendant's wife. The phone records introduced in evidence contain some

duplication of calls.

The phone calls were made to or from telephone numbers registered to Kurilich, and to or from telephone numbers registered to or associated with defendant's wife (her home or work). A grand total of about 350 calls were made between the two persons in a period of about 188 days, an average of about two calls per day, 7 days a week. The calls were at all times of the day and evening, a few in early morning hours between 12 a.m. and 3 a.m.; many occurred on weekends. Kurilich's telephone numbers were registered to an apartment address. It is not known if that was part of his business operations although many of the calls occurred during what would be usual business hours on weekdays. Most of the phone calls were of short duration, one to three minutes, but a significant number were lengthier, 20 to 50 minutes each. The contents of those calls is unknown to the court; neither Kurilich nor defendant's wife testified at the hearing on this writ.

Based on the facts produced, there is no proof of the allegations of the petition that Kurilich was dating defendant's wife during the trial, or was engaged in any personal relationship which caused a conflict with his position as defendant's counsel. The phone calls, although impressive in numbers, do not prove the allegations.

II. No showing was made that Kurilich was ineffective or incompetent as counsel for defendant.

The court has reviewed the depositions of Mark Green, Michael Bland, Kelly Ruiz, Paula La Bar, and Morgan Wiommer, lodged with the Petition, and the deposition of Tammy Ferguson, taken March 25, 1986 and April 2, 1986. (Exhibit 5 at hearing.) The court has also reviewed the official Reporter's transcript of the jury trial, prepared for the Court of Appeal in defendant's appeal.

The court finds as follows:

1. Mark Green did not meet Tammy Ferguson until October 1984, (Deposition, page

8) months after the trial. Kurilich could not reasonably be expected to have produced him as a witness.

2. Michael Bland did testify at the jury trial, and was cross-examined by Kurilich. At his later deosition, Bland (page 25) testified that he had seen Tammy Ferguson use cocaine in the past but did not know if she had used cocaine on the night she was stopped by defendant. Her prior use of cocaine would have been inadmissible.

3. Kelly Ruiz's testimony at the deposition does not appear to contain anything which might have impeached Tammy Ferguson; petitioner does not point out any such testimony. Kurilich could not be expected to learn of a separate rape of Tammy Ferguson by other parties that did not take place until after the trial. (Ruiz deposition, 19-22)

4. Paula La Bar worked with Tammay Ferguson and would testify that Tammy had a reputation for lying. If Kurilich knew about La Bar, she could have so testified at the

jury trial. Failure to call her would not however amount to incompetence. The court does not believe her testimony would have had any effect on the outcome. La Bar's testimony about Tammy's sexual activities would have bene inadmissible.

5. Laura O'Reilly gave no testimony in her deposition which could be considered impeaching of Tammy.

6. Morgan Wimmer did not meet Tammy Ferguson until November 1984. Again, Kurilich could hardly have produced her as a witness at a trial held six months earlier.

7. Tammy Ferguson at her deposition taken April 2, 1986, testified that she had not told "the whole truth" at the jury trial about what happened with defendant. (Deposition, page 14, lines 22-25). At the deposition, she testified that she had in fact orally copulated the defendant (page 12, lines 7-12), and that she had not previously told the truth about it because it was "extremely embarrassing" (Deposition, page 13, lines 5-

7). Further, in that deposition, Tammy testified that defendant rubbed her body with his billy club (pages 50-51), and also that he tok his gun from his holster and rubber her thighs with that (page 55).

At the jury trial, Tammy had testified that defendant touched various parts o her body with his hands or body, but that she did not touch defendant's penis with her hand; she did not mention that oral copulation had take place, although that specific question was not asked. (Trial Transcript, page 69) Defense counsel Kurilich did not, on his cross-examination of Tammy, inquire into the alleged sexual acts testified to by Tammy. She was, however, vigorously cross-examined on many other subjects.

Discussion: A central thread running through petitioner's claims of ineffective counsel is that if only Kurilich had investigated further, he would have been able to impeach Tammy by showing that she made inconsistent statements about what sexual acts

had taken place. The proposed inconsistent statements would have been that Tammy told other persons that she orally copulated defendant, and was caressed by him with his gun and his billy club. (No proposed witness is offered who would say that Tammy ever stated to anyone that no sexual acts took place.) If such impeachment had been attempted, would Tammy than have testified, as she most recently did, that yes, all those other sexual acts took place but she had bee too embarrassed to talk about it? Would the People then have moved to add a charge of forced oral copulation? Kurilich took a tactical course on cross-examination, of avoiding any further details by Tammy of any alleged sexual acts, and instead asserted his client's position that no sexual acts of any kind occurred. It was a reasonable course to follow; the proposed impeachment, even had it been available to Kurilich at the time of trial, would not have had any effect on the outcome on the sexual battery charge and might

have had other disastrous consequences for his client, the petitioner.

The petition for writ of habeas corpus is denied. The writ is discharged.

JAMES F. JUDGE (Retired)
Assigned

JFJ:ms022

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 1987, one copy of the Petition for Writ of Certiorari were mailed, postage prepaid, to:

PRESIDING JUDGE
Orange County Superior Court
700 Civic Center Dr. West
Santa Ana, CA 92701

ATTORNEY GENERAL
110 West "A" Street, STe. 700
San Diego, CA 92101

DISTRICT ATTORNEY
County of Orange
700 Civic Center Dr. West
Santa Ana, CA 92701

CLERK, FOURTH DISTRICT COURT OF APPEAL
600 West Santa Ana Blvd., 3rd Floor
Santa Ana, CA 92701

I further certify that all parties required to be served have been served.

SYLVIA L. PAOLI
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 1987, one copy of the corrected Petition for Writ of Certiorari were mailed, postage prepaid, to:

PRESIDING JUDGE
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701

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700 Civic Center Dr. West
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600 West Santa Ana Blvd., 3rd Floor
Santa Ana, CA 92701

I further certify that all parties required to be served have been served.

SYLVIA L. PAOLI
Attorney for Petitioner